SUPREME COURT, U. S.

FILED
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JOHN F. DAVIS, CLERK

No. ~~1966~~ 109
1966

In the

Supreme Court of the United States

WILLIAM KIRVIN BARLOW,

Appellant,

v.

STATE OF TEXAS,

Appellee.

On appeal from the Court of Criminal Appeals of Texas

JURISDICTIONAL STATEMENT

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Of Counsel:

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JURISDICTIONAL STATEMENT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT

Appellant appeals from the Judgment of the Criminal District Court No. 4 of Dallas County, Texas and the Opinion of the Court of Criminal Appeals of Texas affirming said Judgment and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The Opinion of the Texas Court of Criminal Appeals, Austin, Texas, is reported in 398 S.W. 2d 933 (Tex. Cr. App., 1966), and a copy of said Opinion is attached hereto as Appendix A.

JURISDICTION

This appeal is taken pursuant to 28 U.S.C. 1257 (2) in that Article 802b, Vernon's Ann. P.C. is invalid and repugnant to the Constitution of the United States and the decision appealed from herein is in favor of its validity. Said Statute, as amended, is attached hereto as Appendix B. The Texas Court of Criminal Appeals delivered its decision on January 12, 1966, and Appellant's Motion for Rehearing was denied on March 2, 1966, at which time such Judgment became final. Notice of Appeal was filed in said Court on March 29, 1966.

QUESTION PRESENTED

The question presented is whether or not a Statute is unconstitutional which requires the State to read the allegations contained in the indictment, charging Appellant with a prior misdemeanor conviction to the jury before the jury has passed upon the issue of whether Appellant is guilty or innocent of the primary act charged in the indictment.

STATEMENT

Appellant was convicted in the Criminal District Court No. 4 of Dallas County, Texas of the offense of driving

while intoxicated, second offense, in violation of Article 802b, Vernon's Ann. P. C. Punishment was assessed at eight (8) months confinement in the Dallas County Jail. Appellant is presently at large on bail in the sum of Seven hundred fifty ($750.00) Dollars. When said cause was called for trial, Appellant, on April 12, 1965, and before the reading of the indictment to the jury, moved the Court to quash the indictment for the reason that the act of the legislature under which the indictment was drawn, i.e., Article 802b, supra, was unconstitutional since the same made reading the second paragraph of the indictment charging Appellant with the misdemeanor offense of driving while intoxicated necessary before the jury passed upon the innocence or guilt of Appellant for the primary offense charged.

In the alternative, Appellant moved the trial court to order the Prosecutor not to read the second count to the jury or to do anything from which the jury might learn of the matters set out therein until after the jury decided whether or not Appellant was guilty of the acts charged in the first count of the indictment. The Court, on April 12, 1965, overruled both said Motions and the second paragraph of said indictment charging Appellant with a prior misdemeanor was read to the jury. The Appellant also unsuccessfully urged the same grounds as the basis for his Motion for Instructed Verdict and for New Trial.

The same question as set out above was presented to the Texas Court of Criminal Appeals and in its opinion reported in 398 S.W. 2d 933, the Court said:

> "We also overrule the contention that permitting the state to read the allegations of the second paragraph of

the indictment, charging the prior misdemeanor conviction of driving while intoxicated before the jury had passed upon the issue of whether appellant committed the act charged in the first paragraph of the indictment, constituted a denial of due process guaranteed to appellant under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

By the provisions of Art. 802b, supra, under which the indictment was drawn, the prior misdemeanor conviction is an element of the subsequent felony offense of drunken driving. Skaggs v. State, 160 Tex. Cr. R. 20, 266 S.W. 2d 871. To sustain a conviction for such felony offense, it was incumbent upon the state to plead and prove the prior misdemeanor conviction. Johnson v. State, 160 Tex. Cr. R. 290 S.W. 2d 393. To vest the district court with jurisdiction it was necessary for the indictment to allege the prior misdemeanor conviction. Hill v. State, 158 Tex. Cr. R. 313, 256 S.W. 2d 93.

We do not agree that Art. 802b, supra, is unconstitutional because it permits the state to plead and prove the prior misdemeanor conviction in making out its case before the jury of the subsequent felony offense of driving while intoxicated.

This Court has not followed the holding in Lane v. Warden, 4th Cir., 320 F. 2d 179, cited by appellant, but, on the contrary, has consistently rejected the claim that reading to the jury that portion of an indictment alleging a prior conviction for the purpose of enhancement of the penalty, before a determination of guilt of the primary offense, constitutes a denial of due process of law. Ex parte Gomez, Tex. Cr. App., 389 S.W. 2d 308; Stoneham v. State, Tex. Cir. App., 389 S.W. 2d 468. See also, Breen v. Beto, 5th Cir. 341 F. 2d 96.

The informal bills of exception appearing in the record have been examined and do not present reversible error.

The judgment is affirmed.

THE QUESTION IS SUBSTANTIAL

The issue involved in this Appeal is similar to the one raised by *Lane v. Warden, Maryland Penitentiary*, 320 F. 2d 179 (4th Cir., 1963). In the *Lane* case, the Defendant objected to the reading of that portion of the indictment to the jury which contained detail of two prior narcotic convictions in addition to the facts of the primary offense. The trial court overruled the objection and permitted the indictment to be read to the jury in its entirety. The Defendant contended before the United States Court of Appeals, Fourth Circuit that:

> "by informing the jury of the details of his two prior convictions at the beginning of the trial, the state deprived him of a fair hearing on the charges for which he was then on trial and thereby denied him due process of law guaranteed by the Fourteenth Amendment."

This is exactly the position urged by the Appellant in the instant case. The Court quoted with approval the following language:

> "It cannot be believed that an accused man would ever have a fair trial, resulting in a verdict not affected by prejudice or by considerations by which the jury should not be informed, if during that trial allegations that he had twice before been convicted of state prison crimes have been read to the jury, and the evidence of his former convictions has been placed before them * * *".

The Court then held:

> "We reach the conclusion that under the facts of this case, the reading to the jury, at the commencement of Lane's trial, of that portion of the indictment relating to his prior conviction destroyed the impartiality of the jury and denied him due process of law".

In the present case, that portion of the indictment charging Appellant Barlow with a prior misdemeanor conviction was read under objection to the jury and the same destroyed the impartiality of the jury. The record in this proceeding clearly reflects the prejudice and harm done to Appellant thereby. This is true since the jury, at the close of the testimony, found that Appellant had been convicted of the prior misdemeanor offense, even though the State wholly failed in its efforts to prove the prior conviction. It is also observed that the Texas Court of Criminal Appeals have held that evidence of a prior misdemeanor offense of driving while intoxicated is not even admissible for purposes of impeachment. *Burton v. State*, 194 S.W. 2d 398 (Tex. Cr. App., 1946).

It is therefore respectfully submitted that the question presented by this Appeal is substantial and that it is of public importance.

Respectfully submitted,

CERVIN & STANFORD

By: Alto B. Cervin

Alto B. Cervin
4020 Republic Natl. Bank Tower,
Dallas, Texas,

Attorney for Appellant.

Of Counsel:

PAUL W. WISDOM, JR.
PAUL H. STANFORD

CERTIFICATE

This is to certify that a copy of this Jurisdictional Statement was mailed, postage prepaid, this 18th day of April, A.D. 1966, to the Honorable Charles B. Swanner, Assistant Attorney General for the State of Texas, Austin, Texas; and, to the Honorable Leon Douglas, State's Attorney, Austin, Texas; and, to the Honorable Henry Wade, Criminal District Attorney, County Courthouse, Dallas, Texas.

Alto B. Cervin

Alto B. Cervin

APPENDIX A

William Kirvin BARLOW, Appellant,

v.

The STATE of Texas, Appellee.

No. 38933.

Court of Criminal Appeals of Texas

Jan. 12, 1966.

Rehearing Denied March 2, 1966.

Defendant was convicted, in the Criminal District Court No. 4, Dallas County, John Mead, Jr., of drunken driving, and he appealed. The Court of Criminal Appeals, Dice, C., held that statute making prior misdemeanor conviction an element of subsequent felony offense of drunken driving was not unconstitutional because it permitted State to prove prior misdemeanor conviction in making out its case before jury.

Affirmed.

1. Criminal Law 1202(3)

Testimony of assistant district attorney that he had, while in private practice, represented defendant in criminal case and that defendant had been convicted of misdemeanor offense of driving while intoxicated, and defendant's own admission, while testifying in his own behalf, that he was the same person assistant district attorney had testi-

fied had been so convicted, were sufficient to sustain allegation that defendant had been previously convicted of misdemeanor offense of driving motor vehicle upon public street while intoxicated. U.S. C.A. Const. Amends. 5, 6, 14; Vernon's Ann. P.C. art. 802b.

2. Indictment and Information 166

Under code article, prior misdemeanor conviction is element of subsequent felony offense of drunken driving; and to vest District Court with jurisdiction and to sustain felony conviction, it was incumbent upon State to plead and prove prior misdemeanor conviction. U.S.C.A. Const. Amend. 5, 6, 14; Vernon's Ann. P.C. art. 802b.

3. Criminal Law 1201

Statute making prior misdemeanor conviction an element of subsequent felony offense of drunken driving was not unconstitutional because it permitted State to prove prior misdemeanor conviction in making out its case before jury. U.S.C.A. Const. Amends. 5, 6, 14; Vernon's Ann. P.C. art. 802b.

Paul W. Wisdom, Jr., Cervin & Stanford, Dallas, for appellant.

Henry Wade, Dist. Atty., Jim Zimmermann, Mike Everett and W. John Allison, Jr., Asst. Dist. Attys., Dallas, and Leon B. Douglas, State's Atty., Austin, for the State.

DICE, Commissioner.

The conviction is under Art. 802b, Vernon's Ann. P.C., for the subsequent offense of drunken driving; the punishment, eight months in jail.

It was shown by the testimony of the state's witnesses that on the night in question the appellant, while driving his automobile in a westerly direction on Military Parkway in the city of Dallas, was involved in a collision with a Cadillac automobile that was stopped at a stop sign on Forney Road. In the collision, a trailer, carrying a boat behind appellant's automobile, struck the Cadillac and appellant's automobile came to a stop some sixty feet from the intersection.

Officers Short and Stark, who went to the scene and investigated the accident and had occasion to observe appellant, testified that he had the smell of alcohol on his breath, that his speech was slurred and his eyes were bloodshot, and that he staggered when he walked, and each officer expressed his opinion that appellant at such time was drunk. In their investigation the officers found on the front seat of appellant's automobile a fifth of Canadian Club whiskey that was about half full. Two-fifths of Canadian Club whiskey which had not been opened and two cases of Busch Bavarian beer were found on the back seat.

Robert H. Stinson, an assistant district attorney, called as a witness by the state, testified that while in private practice on June 25, 1959, he represented the appellant in "Judge Gauldin's County Criminal Court No. 2 in Cause No.

17882 B," and that on such date appellant was convicted of the misdemeanor offense of driving while intoxicated. He further testified that such conviction became final prior to the date of the commission of the primary offense.

Testifying as a witness in his own behalf, appellant stated that he had only had two drinks of whisky prior to the time of the collision and swore that the Cadillac automobile was not parked at the intersection but was traveling on Military Parkway, and that the collision occurred when the boat on his trailer jackknifed. On cross-examination, appellant testified that he was the same "William Kirvin Barlow" who Attorney Stinson testified "was convicted in Judge Gualdin's court back in 1959."

[1] We overrule appellant's contention that the evidence is insufficient to support the conviction because the state failed to prove that he had been previously convicted of the misdemeanor offense of driving a motor vehicle upon a public street while intoxicated, as alleged in the indictment.

The testimony of Attorney Stinson and appellant's own admission while testifying in his own behalf were sufficient to establish this allegation in the indictment.

[2, 3]* We also overrule the contention that permitting the state to read the allegations of the second paragraph of the indictment, charging the prior misdemeanor conviction of driving while intoxicated before the jury had passed upon the issue of whether appellant committed the act charged in the first paragraph of the indictment, constituted a denial

of due process guaranteed to appellant under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

By the provisions of Art. 802b, supra, under which the indictment was drawn, the prior misdemeanor conviction is an element of the subsequent felony of the offense of drunken driving. Skaggs v. State, 160 Tex. Cr. R. 20, 266 S.W. 2d 871. To sustain a conviction for such felony offense, it was incumbent upon the state to plead and prove the prior misdemeanor conviction. Johnson v. State, 160 Tex. Cr. R. 290, 269 S.W. 2d 393. To vest the district court with jurisdiction it was necessary for the indictment to allege the prior misdemeanor conviction. Hill v. State, 158 Tex. Cr. R. 313, 256 S.W. 2d 93.

We do not agree that Art. 802b, supra, is unconstitutional because it permits the state to plead and prove the prior misdemeanor conviction in making out its case before the jury of the subsequent felony offense of driving while intoxicated.

This court has not followed the holding in Lane v. Warden, 4th Cir., 320 F. 2d 179, cited by appellant, but, on the contrary, has consistently rejected the claim that reading to the jury that portion of an indictment alleging a prior conviction for the purpose of enchancement of the penalty, before a determination of guilt of the primary offense, constitutes a denial of due process of law. Ex parte Gomez, Tex. Cr. App., 389 S.W. 2d 308; Stoneham v. State, Tex. Cr. App. 389 S.W. 2d 468. See, also, Breen v. Beto, 5th Cir., 341 F. 2d 96.

The informal bills of exception appearing in the record have been examined and do not present reversible error.

Opinion approved by the court.

Art. 802b. *Subsequent offense of driving while intoxicated; felony*

Any person who has been convicted of the misdemeanor offense of driving or operating an automobile or other motor vehicle upon any public road or highway in this state, or upon any street or alley within an incorporated city, town or village, while intoxicated or under the influence of intoxicating liquor, and who shall thereafter drive or operate an automobile or other motor vehicle upon any public road or highway in this state, or upon any street or alley within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, shall for each and every subsequent such violation be guilty of a felony; and upon conviction shall be punished by a fine of not less than One Hundred ($100.00) Dollars nor more than Five Thousand ($5,000.00) Dollars or confinement in the county jail not less than ten (10) days nor more than (2) years, or by both such fine and imprisonment, or by confinement in the state penitentiary not to exceed five (5) years. Added Acts 1941, 47th Leg., p. 819, ch. 507, §2, as amended Acts 1951, 52nd Leg., p. 813, ch. 457, §1.

JUN 29 1966
JOHN F. DAVIS, CLERK

SUPREME COURT, U.S.

NO. [redacted] 109

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM KIRVIN BARLOW,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

MOTION TO DISMISS OR AFFIRM

WAGGONER CARR
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NO. 1235

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM KIRVIN BARLOW,

Petitioner

VS.

THE STATE OF TEXAS,

Respondent

MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MOTION

The Supreme Court of The United States does not have jurisdiction of this appeal and no substantial federal question is presented.

OPINION BELOW

The Opinion is attached to Appellant's Brief.

JURISDICTION

The Court has no jurisdiction for the reason that Article 802b, Vernon's Annotated Penal Code, is valid

on its face and is not repugnant to the Constitution. The decision below decided merely that the Texas procedure in proving convictions thereunder was valid.

QUESTION PRESENTED

Whether or not a conviction for the second offense of Driving While Intoxicated, a felony, is invalid by reason of the State's having proved to the jury the prior misdemeanor offense of Driving While Intoxicated, when, before trial, the State offered with Defendant to remove such proof from the jury if the Defendant would stipulate such prior conviction, and where such prior conviction was necessary to confer jurisdiction upon the Court to try the offense.

STATEMENT

Appellant's statement is correct as far as it goes. Appellant has, however, neglected to inform us that prior to the commencement of the trial, one of the prosecutors, James B. Zimmerman, had a conversation with Defendant's attorneys, Paul W. Wisdom, Jr. and Paul H. Stanford, as to whether they wished to stipulate the Defendant's prior misdemeanor conviction as alleged in the second paragraph of the indictment so that proof of same would not be required to be read to the jury, for jurisdictional purposes. Both attorneys refused to so stipulate (TR. 21-24). Following the refusal to stipulate, the prior conviction was proved by the testimony of the attorney who had represented Appellant at the time of his previous conviction. In addition, Appellant himself admitted, while testifying in his own behalf, that he had been so previously convicted. (S.F. 142-143).

ARGUMENT

The Appeal should be dismissed and the Judgment of the Court of Criminal Appeals of Texas affirmed in view of the State's offer to stipulate.

Article 802b of Texas Penal Code is known as the Driving While Intoxicated, "second offense" statute. In Texas, driving while intoxicated, first offense, is merely a misdemeanor and as such cannot be tried in the District Courts, but must be tried in inferior courts having misdemeanor jurisdiction. Thus, allegations and proof of a prior conviction for driving while intoxicated are necessary to give jurisdiction to the District Courts, and; accordingly, since these allegations and proof are jurisdictional rather than for purposes of enhancement of punishment, as is the fact in the cases cited by Petitioner, i.e., *Robert A. Bell vs. Texas,* 128, Misc.; *Leon Spencer vs. Texas,* 273, Misc. and *Walter Everett Reed vs. Beto,* 268, Misc., the facts of the instant case may be distinguished therefrom.

Had the State not proceeded with proof of the conviction, the District Court would have been without jurisdiction and a motion for instructed verdict would have been granted. In addition, of course, Appellant waived any defects in the procedure by admitting same in his own testimony.

On prior occasions, the Court has expressed interest in what effect, if any, the revision of the Code of Criminal Procedure of Texas might have upon such allegations and proof. In passing, we would point out to the Court that the new Code of Criminal Procedure makes no change in such matters when prior convictions are alleged, not for purposes of enhancement, but

for purposes of conferring jurisdiction. Thus even today in a prosecution under Article 802b, the portion of the indictment alleging prior misdemeanor convictions must be read to the jury or stipulated. See Article 36.01 of the Texas Code of Criminal Procedure (1965).

CONCLUSION

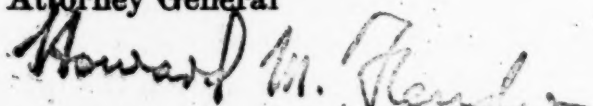
For the above reason this Motion to Dismiss or Affirm should be granted.

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General

T. B. WRIGHT
Executive Assistant
Attorney General



HOWARD M. FENDER
Assistant Attorney General

CHARLES B. SWANNER
Assistant Attorney General

Attorneys for the Respondent

Box R, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Howard M. Fender, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Respondent; I do further certify that a copy of the foregoing Motion to Dismiss or Affirm has been forwarded by United States Mail, First Class, Postage Prepaid, to Alto B. Cervin, Counsel for Petitioner, 1040 Republic National Bank Building, Dallas, Texas, this the 28 day of June, 1966.

Howard M. Fender

Assistant Attorney General

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

BARLOW *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 109. Decided February 13, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE FORTAS would reverse the judgment of the court below for the reasons stated in the dissenting opinion of THE CHIEF JUSTICE in *Spencer* v. *Texas*, 385 U. S. ——.